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JUN 21 1993

FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition Act
of 1992
Rate Regulation

MM Docket 92-266

PETITION OF PARADISE TELEVISION NETWORK, INC.,
FOR PARTIAL RECONSIDERATION AND/OR CLARIFICATION

Judith L. Neustadter
Attorney at Law
2200 Main Street, Suite 611
P.O. Box 2252
Wailuku, Maui, Hawaii 96793
(808) 244-7789

Dennis Niles
Paul, Johnson, Park & Niles
2145 Kaohu Street, Suite 203
P.O. Box 870
Wailuku, Maui, Hawaii 96793
(808) 242-6644

June 21, 1993

Attorneys for Paradise
Television Network, Inc.

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[REDACTED]

for commercial purposes. The Commission should change its formula to set a maximum fixed rate per subscriber applicable to all cable systems. Setting a maximum fixed rate per subscriber would promote cable programming diversity, the primary intent of Congress in establishing the maximum reasonable rate concept.

Second, application of the formula is unclear in light of the multiple tier systems used by cable operators, including the cable operators from which PTN leases its channels. Hence, if the Commission is to retain its current formula, PTN respectfully requests that the Commission clarify how the formula applies in the context of a multiple tier system.

B. Reconsideration is Appropriate

Section 1.429 of the Commission's rules sets forth the standards for a petition for reconsideration. Subsection (a) provides that "any interested person" may petition for reconsideration. PTN is such an interested party.

Section 1.429(b)(3) provides that a petition for reconsideration will be granted where "[t]he Commission determines that consideration of the facts relied on is required in the public interest."

This petition is PTN's first appearance in this matter. PTN learned of this matter just before the Commission issued its Report and Order herein. PTN is a small company operating in Hawaii and is not familiar with the Commission's activities. PTN only learned of the Report and Order after it became involved in federal court litigation with both cable operators from which it leases cable channels.

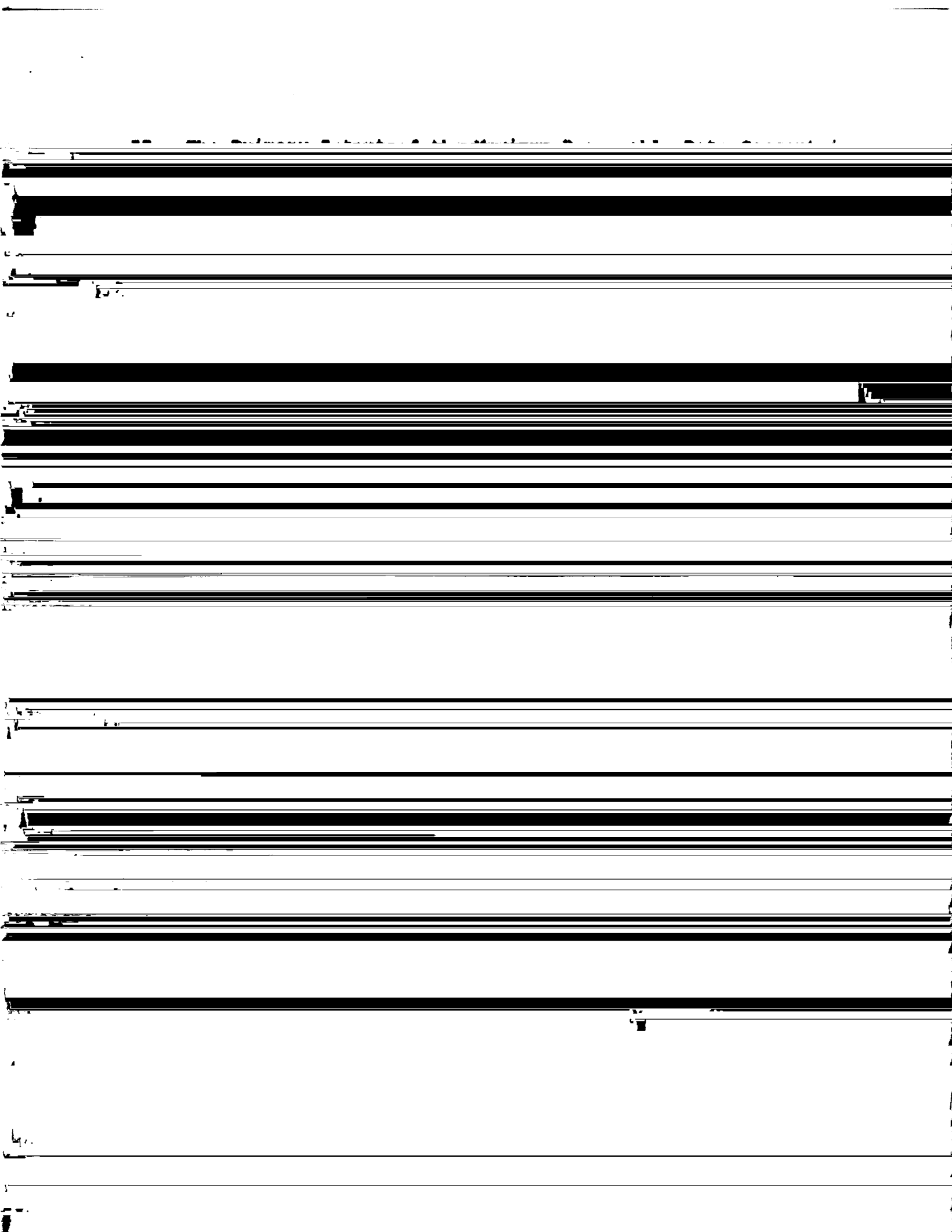
As far as PTN can determine, no other commercial leased access user has appeared in this proceeding to present information about the real-life workings of a leased access programmer. PTN submits that the facts raised in this petition should be considered by the Commission under § 1.429(b)(3) because it would be in the public interest to do so.

In this regard, PTN notes that the Commission made several references in its Report and Order to the dearth of information regarding real-life commercial leased access programmers and noted that its rules would, accordingly, need to be flexible and subject to change. As an example:

[W]e did not receive a large response relating to leased access issues. Thus, the rules we adopt should be understood as a starting point that will need refinement In this regard we are aware that leasing issues may need to be addressed in quite different fashions depending upon the nature of the service involved Thus, we are not this time attempting to comprehensively resolve all the issues potentially involved

Report and Order, ¶ 491.

As will be shown herein, there are some obvious and critical problems with the formula adopted by the Commission for determining the maximum reasonable rate that may be charged for commercial leased access. There is no need to wait to see how the rules are applied. Immediate correction is necessary.



III. Application of the Formula Mandated by the Commission Would Allow Cable Operators to Set Rates So High it Could Effectively Prevent Unaffiliated Programmers from Leasing Cable Channels for Commercial Purposes

The Commission determined that the maximum commercial leased access rate that a cable operator may charge is "the highest implicit net fee charged any nonaffiliated programmer (excluding leased access programmers) within the same programmer category." Report and Order, Appendix C, § 79.970(b).

The method for calculating the "highest implicit net fee" is as follows:

The implicit fee charged an unaffiliated programmer shall be calculated by determining the monthly price per subscriber that the operator pays to carry the programming of nonaffiliated providers and deducting the monthly price subscribers pay to view the programming of the nonaffiliated provider. This difference is multiplied by the percentage of subscribers able to receive the nonaffiliated provider's programming. ***

Report and Order, Appendix C, § 76.970(c).

As described more fully below, it is unclear how the formula would be applied in the context of a multiple tier system. However, for the purpose of this discussion, PTN will use the following example based on the relatively small Maui cable systems in which it operates, using the methodology illustrated in the Report and Order, § 518, n. 1312.

On Maui, the cable operators carry a public broadcasting station on its basic tier, for which the operators presumably pay nothing. Maui's two cable systems have between 10 and 12 channels on their basic tiers. PTN assumes 10 channels for the purpose of this example. The monthly rate for

subscribing to the basic tier is about \$10.00. Because all Maui subscribers subscribe to the basic tier, the implicit fee for a subscriber will be: $[(\$1.00 - \$0.00) \times 1.00] = \$1.00$. Thus, as shown in this example, the maximum reasonable rate that could be charged would be \$1.00 per subscriber per month.

On one of the Maui systems, it is arguable that there may be as many as 18,000 subscribers. Applying the rate set forth in the example above, that would amount to a maximum reasonable rate of \$18,000.00 per month,⁴ an amount far in excess of what PTN currently pays to lease its cable channels.

Were PTN to be required to pay as much as \$18,000.00 per month, it would simply be so economically unfeasible as to force PTN off the air. The economic realities of the marketplace, particularly on Maui, just do not support such rates. Forcing PTN or other similar commercial leased access users off the air is directly contrary to the intent behind the creation of the maximum reasonable rate concept.

PTN earns its revenues primarily from advertising sales. PTN's typical advertisers are restaurants or other local small businesses with a finite amount of goods or services to sell and, accordingly, a relatively limited advertising budget. Advertising revenues for a local cable channel are not on the

⁴ If a leased access user were in a market of 200,000 subscribers under the same circumstances, applying this formula, that programmer would have to contend with a maximum reasonable rate of \$200,000.00 per month. The market conditions would still be the same as for a smaller market, such as Maui, because to a large extent the local businesses seeking advertising time would still be faced with limited goods and services available and limited advertising budgets.

same scale as national companies advertising on the networks.

Moreover, one of the cable operators from which PTN leases a channel is directly competing with PTN for the same advertising revenue.⁵ The operator, though, need not pay lease rent and, thus, can afford to sell advertising time at a relatively low rate.

In light of the small advertising budgets that most local businesses have and in light of the need to compete with the cable operators themselves for limited advertising revenue, it is particularly difficult for PTN to increase its advertising rates to any significant extent. For PTN to raise sufficient revenue to be able to pay, for example, \$18,000.00 per month to lease a cable channel, PTN would have to raise its advertising rates so substantially that it would lose most, if not all, of its advertisers.

~~The amount of advertising revenue that PTN can raise~~

IV. The Commission Should Change the Maximum Reasonable Rate to a Fixed Amount, at Least for Advertiser-Supported Programmers

The best alternative would be to mandate a fixed rate per subscriber that would apply to all cable systems. In addition to the obvious benefits of clarity and simplicity,⁶ a fixed maximum reasonable rate would promote competition and diversity of programming.

PTN proposes a maximum fixed rate of \$.30 per subscriber per month. This amount is approximately the break-even figure for a leased access user, considering market conditions, production, labor, and marketing costs, and general overhead.

Moreover, setting a fixed maximum reasonable rate would not adversely affect the cable operators. There is little, if any, overhead attributed to carrying the signal and the operators would surely profit by leasing channels at a rate as high as \$.30 per subscriber. Presumably the cable operators pay less themselves to obtain their own programming.

Finally, as the maximum reasonable rate is presently determined, there are three categories of programmers, each with its own highest implicit fee: pay per view; home shopping; and, other. Report and Order, Appendix C, § 76.970(d), (f). PTN and

⁶ A business is far more likely to attract new entrepreneurs when costs are readily identifiable and easily projected. Starting a business as a cable leased access provider involves substantial start-up costs that will not be recouped in the short term. Knowing what costs to expect will make it easier for new businesses to incur the debt and expense necessary to get started, and this, in turn, will promote cable programming diversity.

other small market programmers supported by advertising sales fall under the "other" category. PTN encourages the Commission to designate a fourth category for advertiser-supported programmers and to apply the \$.30 per subscriber rate only to those falling into that category.

V. If the Commission is to Retain its Formula, the Commission Should Clarify how the Formula Applies in a Multiple Tier Context

If the Commission decides to retain its formula, it must clarify its application in a multiple tier context.

Under section 79.970(b), the maximum allowable commercial leased access rate is the highest implicit net fee charged any nonaffiliated programmer (excluding leased access programmers) within the same "program category." Subsection (d) indicates that:

[T]he highest implicit net fee charged any nonaffiliated provider in each category shall be the maximum monthly leased access rate per subscriber that the operator could charge a commercial leased access programmer in that category.

Report and Order, Appendix C, § 79.970(d) (emphasis added).

In contrast, the discussion of this calculation in the Report and Order, §§ 515-522, particularly n. 1312, indicates that the calculation should be limited to other nonaffiliated access programmers in the same category on the same tier, rather than same category programmers on the system as a whole.


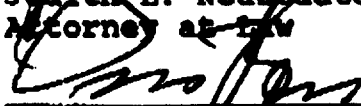
Whether or not the formula applies to all other programmers in the same category on the system or only those on the same tier within the system will have a significant impact on

the calculation of the maximum reasonable rate. For example, assume there is a two-tier system with 10 channels in the basic tier and 15 channels in the second tier, with the basic monthly charge of \$10.00 and a premium charge of \$15.00 per month, but only 50% of the subscribers purchase the second tier. If a programmer were to lease a channel on the basic tier, would the Commission calculate the highest implicit fee based only on those other channels in the same category as that programmer only on the basic tier, or would the Commission include all channels in that programmer's category regardless of tiers? Clarification of this issue would be helpful.

VI. Conclusion

For the reasons stated herein, PTN respectfully requests: (1) that the rules setting the formula for determining the maximum reasonable rate that a cable operator may charge for leased commercial access be reconsidered and changed to a fixed rate of no more than \$.30 per subscriber per month, at least for advertiser-supported programmers; and, (2) alternatively, if the Commission declines to reconsider, it should clarify how the formula applies in a multiple tier context.

Respectfully submitted,
PARADISE TELEVISION NETWORK, INC.

By 
Judith L. Neustadter
Attorney at Law

Dennis Niles
Paul, Johnson, Park & Niles

June 21, 1993
Attachment (Declaration of James Kartes)

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DECLARATION OF JAMES KARTES

JAMES KARTES, pursuant to 28 U.S.C. § 1746 hereby makes
the following declaration:

1. I am a shareholder, director, and officer of

Verizon Communications Inc. I make the statements in this